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Mutual Recognition in Criminal Matters, Deprivation of Liberty and the Principle of Proportionality*

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1. Introduction

The application of the principle of mutual recognition to judicial cooperation in criminal matters within the European Union (EU) has resulted in the paradigmatic tension between punishment and its internal limits, namely the deterrence, rehabilitation, and retribution function of punishment, as well as its external limits, namely fundamental rights. On the one hand, there is the effectiveness of national systems of criminal justice. Mutual recognition increases the likelihood of prosecution and conviction of offenders, which has a noteworthy deterrent effect on potential wrongdoers. On the other, some of these measures pursue (also) rehabilitation. Furthermore, fundamental guarantees such as the right to liberty are particularly under the spotlight, which reinforces the dialectic with limits of punishment. The right to liberty is one of the rights particularly under the spotlight when it comes to judicial cooperation as between member states. There are at least four legislative measures applying mutual recognition to criminal matters that directly involve deprivation of liberty: the Framework Decisions (FDs) on the European Arrest Warrant (EAW), the transfer of prisoners, probation measure and pre-trial orders alternative to detention ('European Supervision Order' or 'ESO FD').¹

The Explanations to Article 6 EU Charter of Fundamental Rights ('CFREU' or 'the Charter') – stating the right to liberty and security of person – clarify that 'The rights in Article 6 are the rights guaranteed by Article 5 of the European Convention of Human Rights (ECHR), and in accordance with Article 52(3) of the Charter, they have the same meaning and scope'. Article 5 ECHR, in turn, stipulates that no one shall be deprived of liberty, save in a closed list of cases and in accordance with the procedures established by law. One of these grounds is Article 5(1)(f) ECHR, allowing the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition. The test elaborated by the European Court of Human Rights (ECtHR) for reviewing states' laws and practices requires that deprivation of liberty in the context of extradition be: carried out in good faith; closely connected to the grounds of

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¹ Council Framework Decision (JHA) No 584/2002 [2002] OJ L190/1; Council Framework Decision (JHA) No 909/2008 [2008] OJ L327/27; Council Framework Decision (JHA) No 947/2008 [2008] OJ L337/102; Council Framework Decision (JHA) No 829/2009 [2009] OJ L294/20.

detention relied on by the executing judicial authority; enforced in appropriate place and conditions; and of reasonable length in relation to the purposes pursued. The Strasbourg Court does not require that a decision on deprivation of liberty in this context be necessary and proportionate, but only that extradition procedures be ongoing and carried out with due diligence.² Article 5(1)(f) and the ECtHR's interpretation thereof are relevant insofar as the CJEU has relied on that to interpret the right to liberty in the context of judicial cooperation in criminal matters.

The absence of a proper assessment in terms of proportionality from the arbitrariness test has been criticised in the context of the ECHR.³ The application of that test to mutual recognition might be even more controversial. The principle of proportionality is a cornerstone of the CJEU's review of rights restrictions by the Union or member states, and is now crystallised in Article 52(1) CFREU. Furthermore, other connotations of the principle of proportionality can be highly relevant to the right to liberty within mutual recognition in criminal matters: in particular, proportionality of penalties to the seriousness of the offences as stated in Article 49 CFREU.⁴

This article assesses the existing framework of EU law concerning the right to liberty and mutual recognition from the specific perspective of proportionality under Article 52 CFREU. Firstly, the paper introduces the benchmark of analysis of this research, namely the different principles of proportionality in EU law. Secondly, the key features of mutual recognition in criminal justice are outlined. Thirdly, the two main scenarios of this research are analysed: on the one hand, the EAW FD and the CJEU's interpretation; on the other, the three FDs on transfer of prisoners, probation measures and the ESO. The conclusions reveal that, in spite of increasing attention paid to proportionality and the right to liberty in mutual recognition, there are thorny issues left unanswered by the EU institutions.

2. The Principle(s) of Proportionality in EU Law

The right to liberty requires that rules allowing for deprivation of liberty be drafted, enacted and enforced in accessible and foreseeable way (legal certainty), and in compliance with the principle of proportionality.⁵ As found by the CJEU, the right to liberty protects against arbitrariness through the requirement that detention rest on a clear, predictable and accessible legal basis.⁶ *Certainty* and

2 R White and C Ovey, Jacobs, White & Ovey: The European Convention on Human Rights, 5th ed (Oxford University Press, 2010), p 122 ff.

3 D. Wilsher, *The Administrative Detention of Non-Nationals Pursuant to Immigration control: International and Constitutional Law Perspectives*, in *International and Comparative Law Quarterly*, 53(4) 2005, 905

⁴ As clarified below, however, the present article focuses on proportionality given by the interoperation between Articles 6 and 52 CFREU.

5 On the role of proportionality for limiting mutual recognition see Mitsilegas, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe*, (Hart: 2016), pp. 124 ff.

6 Case C-528/15, *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v Salah Al Chodor and Others*, paras 27-47.

proportionality of deprivation of liberty should be tested across a spectrum of situations that goes from the legislative adoption of norms authorising detention, to the enforcement of sentences – mainly, governed by prison rules.⁷

The principle of proportionality is key both to EU,⁸ and criminal, laws.⁹ Article 52 CFREU states that limitations to the exercise of the rights and freedoms recognised by the Charter are subject to the principle of proportionality. It requires that the restriction be suitable and necessary to achieve a legitimate aim.¹⁰ The proportionality test is a threefold one, and implies an assessment of the measure in terms of its suitability, necessity and proportionality *stricto sensu*.¹¹ The suitability test evaluates appropriateness of the means (the restriction) in relation to the achievement of the objective pursued. The necessity test implies that the measure chosen is the least intrusive measure for the right or freedom restricted, on condition of being equally effective to meet that objective. The proportionality *stricto sensu* will be complied with if the means adopted does not impose an excessive burden on the right. This last part of the test is considered to be the least clear. According to Alexy, proportionality *stricto sensu* comes with a threefold sub-test:

the first stage involves establishing the degree of non satisfaction or of detriment to the first principle. This is followed by a second stage in which the importance of satisfying the competing principle is established. Finally, in the third stage it is established whether the

7 For a more detailed discussion on the importance of enforcement to the right to liberty, see L. Mancano, 'The right to liberty in European Union law and mutual recognition in criminal matters', (2016), *Cambridge Yearbook of European Legal Studies*, Vol 18, pp 1-24.

8 T. Harbo, *The Function of the Proportionality Principle in EU Law*, in 16 *European Law Journal* (2010), pp. 158-185; G.de Búrca, *The Principle of Proportionality and its Application in EC Law*, 13 *Yearbook of European Law* (1993), pp. 105-150; F. Jacobs, *Recent Developments in the Principle of Proportionality in European Community Law*, in E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe*, Oxford: Hart Publishing, 1999, pp. 1-22.

9 A. Ashworth, *Sentencing and Criminal Justice*, Cambridge: Cambridge University Press, 2010, pp. 104-155; A. von Hirsch and A. Ashworth, *Proportionate Sentencing: Exploring the Principles*, Oxford: Oxford University Press, 2010, pp. 131-163; D. Husak, *The Criminal Law as Last Resort*, in *Oxford Journal of Legal Studies*, Vol. 24, No. 2 (2004), pp. 207-235; A. von Hirsch, *Proportionality in the Philosophy of Punishment*, in *Crime and Justice*, Vol. 16 (1992), pp. 55-98; P. H. Robinson and J. M. Darley, *Does Criminal Law Deter?*, in *Oxford Journal of Legal Studies*, Vol. 24, No. 2 (2004), pp. 173-205.

10 Art 52(1) CFREU stipulates that 'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'.

11 Authors see proportionality mainly as a twofold test, the last two components usually being assessed together by the Court. T Tridimas, *The General Principles of EU Law* (Oxford, Oxford University Press, 2006).

importance of satisfying the latter principle justifies the detriment to or non-satisfaction of the former.¹²

The importance of proportionality to EU criminal law¹³ is complemented by proportionality under Article 49 CFREU, which stipulates that the level of penalties must relate to the seriousness of the offence. The evaluation under criminal law proportionality involves both the legislative and the sentencing levels, that is to say the penalties as provided by the law and applied to the concrete cases by the judges¹⁴. Proportionality under Article 52 CFREU relates the means to the aim, has a *utilitarian* foundation, and must be anchored to a specific Article of the Charter (in this case, Article 6 CFREU). Proportionality under Article 49 has a *retributive* meaning,¹⁵ and focuses on proportionality of punishment in relation to the offences. Although proportionality of sanctions is extremely important, this article limits its reading of the relevant EU law through the binomial Articles 6-52 CFREU.

Article 5(1)(f) concerns extradition, rather than punishment directly. However, extradition – or, to be more tuned with the EU legal order, transfer of persons - takes place to enforce a punishment, or to try the person concerned. It naturally involves questions on relationship between different criminal justice systems, on the one hand, and between the person concerned and those systems and the community, on the other.

Evaluating EU criminal law on the basis of *these* principles of proportionality means examining how the EU justifies the use of measures involving deprivation of liberty, and the way they are worded, interpreted and implemented.¹⁶

3. Mutual Recognition in Criminal Matters

The 1999 Tampere Council adopted the principle of mutual recognition as the cornerstone of judicial cooperation in criminal matters. In criminal law,¹⁷ mutual recognition is used to step up judicial

12 R. Alexy, 'On Balancing and Subsumption. A Structural Comparison' (2003) 16 *Ratio Juris* 433, 436, 437.

13 C. Sotis, *I principi di necessità e proporzionalità della pena nel diritto dell'Unione europea dopo Lisbona*, in *Diritto Penale Contemporaneo*, 1/2012, pp. 111-122; M. Böse, *The Principle of Proportionality and the Protection of Legal Interests (Verhältnismäßigkeit und Rechtsgüterschutz)*, Vol. 1, No. 1, 2011, pp. 34-42; P. Asp, *Two Notions of Proportionality*, in K. Nuotio (Ed.), *Festschrift in honour of Raimo Lahti*, 2007, pp. 207-219.

14 See for instance D. van Zyl Smit and A. Ashworth, *Disproportionate Sentences as Human Rights Violations*, in *The Modern Law Review*, (2004) 67(4) MLR, pp. 541-560.

15 C. Sotis, *I principi di necessità e proporzionalità della pena*, *op. cit.*, pp. 119 onwards.

16 Although this assessment concerns member states' laws and practices as well, as they are subject to the Charter when they act in the scope of application of EU law, this paper focuses on EU law specifically.

17 As known, mutual recognition in criminal matters is a principle borrowed from the law of the internal market, where it was introduced by the *Cassis de Dijon* judgment of the CJEU. *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, Case C-

cooperation between Member States within the EU: a judicial order issued by one Member State is to be recognised and executed by another Member State, save where grounds for refusal apply. The principle of mutual recognition streamlines the previous system of extradition, by introducing a higher level of automaticity in inter-state cooperation in criminal matters.¹⁸ Firstly, it abolishes the principle of dual criminality (although not in all cases); secondly, it allocates the responsibility for the surrender on judicial rather than political authorities; thirdly, it (almost completely) drops the prohibition for a state to extradite its own nationals (also referred to as ‘nationality exception’ or ‘nationality ban’).¹⁹ The cooperation on a given order (eg arrest warrant) is regulated by specific legislative instruments adopted at EU law level. Major concerns have been voiced towards the inadequate level of individual safeguards.²⁰ Part of the criticism are related to the conceptual centrepiece of mutual recognition, namely the principle of mutual trust. The principle amounts to the debatable presumption that Member States act in compliance with fundamental rights.²¹ The next section analyses the impact of the four FDs on the right to liberty from the perspective of the principle of proportionality, and shows how problematic such a presumption can be.

4. The Right to Liberty, Proportionality and the European Arrest Warrant

4.1. The European Arrest Warrant

4.1.1. The European Arrest Warrant Framework Decision

The EAW aims to replace extradition procedures with a smoother and swifter system of surrender between judicial authorities to try the person concerned or enforce a penalty already issued. While Member States shall execute any European arrest warrant on the basis of the principle of mutual

120/78, EU:C:1979:42; K Armstrong ‘Mutual Recognition’ in C Barnard and J Scott (eds), *The Law of the Single European Market. Unpacking the Premises*, (Hart Publishing, 2002), pp. 225-268.

18 For a diachronic analysis, see S Miettinen, ‘Onward Transfer under the European Arrest Warrant: Is the EU Moving Towards the Free Movement of Prisoners?’ (2013) 5 (1) *New Journal of European Criminal Law* 99.

19 Z Deen-Racsmany and R Blekxtoon, ‘The Decline of the Nationality Exception in European Extradition? The Impact of the Regulation of (Non-) Surrender of Nationals and Dual Criminality under the European Arrest Warrant’ (2005) 13 (3) *European Journal of Crime, Criminal Law and Criminal Justice* 317.

20 V Mitsilegas, ‘The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU’ (2006) 43 (5) *Common Market Law Review* 1277; S Peers, ‘Mutual Recognition and Criminal Law in the European Union: Has the Council Got It Wrong?’ (2004) 41 (1) *Common Market Law Review* 5.

21 E. Sellier and A. Weyember, Criminal procedural laws across the Union – A comparative analysis of selected main differences and the impact they have over the development of EU legislation, Study for the European Parliament, June 2018; V Mitsilegas, ‘The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual’ (2012) 31 (1) *Yearbook of European Law* 319.

recognition, the FD shall not the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU.²²

The FD sets precise deadline for recognition and execution.²³ The executing judge must decide whether the person arrested must be kept in detention pending the decision on the recognition. Release may be ordered, provided that measures are taken so as to ensure that the person will not abscond.²⁴ The issuing state must deduct the period of detention already served by the person from the total period of detention to be served therein.²⁵ The FD provides that the recognition and execution of the EAW can be refused on the basis of mandatory and optional grounds for refusal of execution. None of these grounds, however, gives national authorities the possibility to refuse the execution of an EAW for (past or potential) fundamental rights violations. The following section discusses the CJEU's interpretation of the right to liberty and the principle of proportionality in the context of the EAW FD.

4.1.2. *The CJEU's case law on EAW liberty and proportionality*

In the Court's case-law, the relevance of the principle of proportionality and the right to liberty has emerged in different situation: refusal of execution of a EAW on the basis of breach of the right to liberty (*Radu*), the relevance of the right to liberty and proportionality to the interpretation of the EAW FD (*Lanigan* and *Vilkas*), the role of detention conditions in the EAW system (*Căldăraru*); definition of deprivation of liberty and deduction of detention for the execution of the sentence following the surrender (*JZ*).

Radu regarded the issuance of EAWs against a Romanian national who claimed that his defence rights had been violated.²⁶ The Court was asked as to whether the EAW must satisfy the requirements of necessity and proportionality, and its execution can be refused in case of (actual or potential) violations of Articles 5 and 6 ECHR or Articles 6, 48 and 52 CFREU. The AG Sharpston recalled the arbitrariness test elaborated by the ECtHR (good faith; connection to detention relied on by the judicial authority; appropriate detention conditions; reasonably length). Furthermore, she suggested that the execution of a EAW may be refused on fundamental rights ground (in particular Articles 5 and 6 ECHR and/or Articles 6, 47 and 48 CFREU), but this could occur where 'the deficiency or deficiencies in the trial process [are] such as fundamentally to destroy its fairness'²⁷. Breaches that are remediable would not

22 See note 1 above, Article 1(3) and (2).

23 Ibid, Articles 17, 23 and 24.

24 Ibid, Article 12.

25 Ibid, Article 26.

26 *Proceedings relating to the execution of European arrest warrants issued against Ciprian Vasile Radu*, C-396/11, EU:C:2013:39.

27 *Radu*, AG's Opinion, EU:C:2012:648, para 83. The AG proposed this test instead of that of the ECtHR, according to which execution may be opposed in case of *flagrant denial* of fair trial in the requested country, or where a potential breach is established 'beyond reasonable doubt'.

justify a refusal to transferring the requested person to the Member State where those rights are at risk. The Court paid very little attention to the right to liberty. Moreover, though acknowledging that the right to be heard is enshrined in Articles 47 and 48 CFREU, it did not elaborate much on this either, posed much more an emphasis on the ‘enforcement’ objectives of the EAW FD, and rejected the possibility, for the executing judge, to refuse the execution of a EAW on fundamental rights ground.²⁸ Admittedly, Mr Radu argued that his rights had been violated because he had not been summoned by the issuing judge before the EAW was issued. The question posed by the referring court had to do, more broadly, with the possibility to refuse the execution of a EAW on the basis of a fundamental rights breach. Granted, references for preliminary rulings always arise from a concrete case, and the violation of fundamental rights in the case of Mr Radu could be questioned. Unlike the AG, the Court seemed to completely close the door, at least at that moment, to considering breaches of fundamental rights as a basis for refusing the execution of a EAW.

In *Lanigan*, the questions referred concerned the interpretation of Article 17, read in conjunction with Article 15, and Article 12 EAW FD. Articles 17 and 15 establish procedures and time-limits for the decision on the execution of a EAW, whereas Article 12 provides for the possibility, for the executing judge, to order the provisional release of the person concerned during execution procedures.²⁹ The Court found that the expiring of the time-limits neither precludes the execution of the EAW, nor creates a general and unconditional obligation to release the person. Such an interpretation ‘could limit the effectiveness of the surrender system put in place by the Framework Decision and, consequently, obstruct the attainment of the objectives pursued by it’.³⁰ However, the CJEU found that Article 1(3) determines an obligation to interpret the EAW FD in compliance with the Charter: in this specific case, Articles 6 and 52 CFREU.³¹ As for the right to liberty, the CJEU relied on the ECtHR’s case-law on Article 5(1)(f) ECHR (which, however, refers to the right to liberty in the context of *extradition* procedures). In particular, the right to liberty would result in the duty, for the executing judge, to hold that person in custody so long as the procedure for the execution are carried out in a sufficiently diligent manner. The executing judge is required to consider factors such as: the possible failure to act on the part of the authorities of the Member States concerned; any contribution of the requested person to that duration; the sentence potentially faced by the requested person; the potential risk of that person absconding; the fact that the requested person has been held in custody for a period the total of which greatly exceeds the time-limits stipulated in Article 17. Should the judge opt for release, measures should be adopted to ensure that the material conditions necessary for the surrender remain fulfilled.

28 *Radu*, EU:C:2013:39, para 43.

29 *Minister for Justice and Equality v Francis Lanigan*, C-237/15 PPU, EU:C:2015:474.

30 *Ibid*, para 50.

31 *Ibid*, paras 53 onwards.

In *Vilkas*,³² the question arose as to whether Article 23(5) FD – obligation of release on expiry of surrender deadlines – applies to a situation where the new date for surrender agreed under Article 23(3) could not be met because of the continuing offender’s resistance to execution of the EAW. While the CJEU confirmed that states are not exempt from the obligation laid down in the FD once the deadline for the new surrender has expired, it also found that there is no obligation of release where the second attempt at surrendering within the deadline is prevented by circumstances beyond states’ control.³³ The executing judge has discretion under Article 12 FD as to whether the circumstances allow for freeing the person concerned.³⁴ The margin for detaining beyond the terms expressly provided in the FD is considerably broadened.

A seminal judgement for the operation of the EAW FD was issued in *Căldăraru*. The CJEU had to deal with the possibility to refuse the execution of an EAW on the basis of the risk of inhumane treatment in the issuing Member States (Romania and Hungary), due to poor detention conditions.³⁵ The AG Bot argued that reading Article 1(3) as a possible ground for refusal based on potential fundamental rights violation would be contrary to the structure of the system, and undermine the relationship of trust amongst Member States, on the one hand. On the other hand, the principle of proportionality would require that the issuing judicial authority carry out a review of proportionality when issuing a EAW, even disapplying its national legislation imposing the principle of mandatory prosecution, if necessary. As far as the executing judicial authority is concerned, the latter might ask the issuing judicial authority for any information necessary to enable it to assess whether surrender of the requested person is likely to expose him to detention conditions that are disproportionate.³⁶ On being a general principle of EU law, proportionality could be relied on to refuse the execution of a EAW. According to the AG, detention conditions would be proportionate where: they do not result ‘in the detachment from society of the person concerned’, in the case of a EAW issued for execution purpose; they remain strictly related to the aim of prosecution, in the case of a EAW issued for that purpose. The issuing judge, on its part, is called on to apply a proportionality check, and issue a EAW by taking into account the nature of the offence and the regime of execution. Broadly, the issuing Member State should take all necessary measures, including reforms of criminal policy, to ensure that that person serves his/her sentence in conditions which respect fundamental rights.

The Court decided differently from the AG, by according Article 1(3) a major role for fundamental rights protection. The CJEU found that Article 1(3) obliges Member States to respect the prohibition of inhumane and degrading treatment, as stated in Article 4 CFREU. This implies that, where the executing judge has objective, reliable, specific and properly updated evidence showing that there are deficiencies,

32 Case C-640/15, *Minister for Justice and Equality v Tomas Vilkas*, EU:C:2017:39

33 Ibid, para 74.

34 Ibid, para 42.

35 *Aranyosi and Căldăraru*, EU:C:2016:198.

36 Ibid, para 173 onwards.

which may be ‘systemic *or* generalised, *or* which may affect certain groups of people, *or* which may affect certain place of detention, with respect to detention conditions in the issuing Member State’, that judge must, pursuant to Article 15(2) EAW FD, request that the issuing judge provide supplementary information (emphasis added). The evidence at the basis of the request under Article 15(2) may be obtained from, *inter alia*, ‘judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN’. The decision on the surrender must be postponed until supplementary information is obtained, allowing it to exclude the risk of inhumane treatment. If the risk cannot be discounted within a reasonable time, the executing judge is to decide whether the surrender procedure should be brought to an end. Meanwhile, the person concerned should be held in custody only in so far as the duration of the detention is not excessive, on the basis of the requirement of proportionality laid down in Article 52(1) of the Charter.³⁷

JZ concerned the interpretation of the concept of ‘detention’ under Article 26 EAW FD, according to which the issuing Member State must deduct all periods of detention arising from the execution of a EAW from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed.³⁸ In particular, the referring court asked whether the concept of detention under Article 26 EAW FD, interpreted jointly with Articles 6 and 49 CFREU, covers measures applied by the executing Member State consisting in the electronic monitoring of the place of residence of the person to whom the arrest warrant applies, in conjunction with a curfew. Before the referring court, *JZ* had requested that the period during which he was subject to a curfew in the UK and to electronic monitoring be credited towards his custodial sentence.

Firstly, the Court pointed out that the national judge has to interpret national law, as far as possible, in the light of the wording and the purpose of the FD.³⁹ Article 26(1) EAW FD makes no express reference to the law of the Member States, which means that its meaning and scope must normally be given an autonomous and uniform interpretation throughout the EU.⁴⁰ The terms ‘detention’ and ‘deprivation of liberty’ - used interchangeably in the various language versions of Article 26(1) - imply a situation of confinement or imprisonment, and not merely a restriction of the freedom of movement. As regards the context of Article 26(1), Article 12 envisages the possibility for the executing judge to order the provisional release of the person concerned, in conjunction with measures to prevent him/her from absconding. Thus, the EAW FD provides for *alternatives* to detention to be used in the context of EAW procedures. Concerning the objective of Article 26(1), the Court argued that the deduction obligation

³⁷ Ibid, para 101.

³⁸ *JZ v Prokuratura Rejonowa Łódź – Śródmieście*, Case C-294/16 PPU, EU:C:2016:610.

³⁹ *Proceedings concerning the execution of a European arrest warrant issued against João Pedro Lopes Da Silva Jorge*, C-42/11, EU:C:2012:517 paras 53 and 54.

⁴⁰ *Proceedings concerning the execution of a European arrest warrant issued against Szymon Kozłowski*, C-66/08, EU:C:2008:437; para 42.

under that article aims to meet the general objective of respecting fundamental rights, as referred to in recital 12, and recalled in Article 1(3) EAW FD; in particular, preserving the right to liberty and the principle of proportionality of penalties, protected by Articles 6 and 49 CFREU.⁴¹

While deprivation of liberty needs not take place necessarily in the form of detention, criteria must be taken into account such as the type, duration, effects, manner of implementation and severity of the measure, to understand how the latter can be comparable to imprisonment.⁴² This is confirmed by the ECtHR case law on Article 5 ECHR, which is not concerned with mere restrictions of liberty of movement.⁴³ In light of the foregoing, the Court found that the measures to which Mr JZ was subject, while surely restricting his liberty, could not be regarded as deprivation of liberty. However, the Court clarified that Article 26(1) EAW FD *merely imposes a minimum level of fundamental rights protection* (emphasis added). On the basis of its national law, the issuing judge is allowed to deduct, from the total period of detention which the person concerned would have to serve therein, the period during which that person was subject, in the executing state, to measures involving not a deprivation of liberty but a restriction of it.⁴⁴

4.1.3. Proportionality and The Right to Liberty in the EAW

The possible application of the principle of proportionality in the context of the EAW has been heavily debated.⁴⁵ What the case law discussed above shows is that both the issuing and executing state have a key role in protecting the right to liberty. Leaving aside the responsibility of cooperating with each other imposed by the FD in different provisions, the issuing judge comes into play especially before issuing and following the execution of the EAW. Article 26 EAW FD reveals that proportionality is at stake even once the EAW has been implemented. Proportionality of penalties under Article 49 CFREU would require the issuing judge not to issue a EAW for particularly petty or tame offences. Furthermore, in *JZ* Articles 49 and 6 CFREU were used to allow the issuing judge to apply its own definition of detention, should this amount to a higher level of protection. It should be remembered, however, that such leeway was left in a situation where the enforcement of the EAW had been secured, with the person concerned surrendered to the issuing state. This seems to confirm *a contrario* the *Melloni* principle that higher national standards can be applied as long as they do not jeopardise the effectiveness of the EAW.⁴⁶

41 *JZ*, EU:C:2016:610, para 43.

42 *Ibid*, para 47.

43 ECtHR, 6 November 1980, *Guzzardi v Italy*, Application no 7367/76, Series A no 39 [1980] ECHR 5, para 92; and ECtHR, 5 July 2016, *Buzadji v Republic of Moldova*, Application no 23755/07, para 103. ECtHR, 20 April 2010, *Villa v Italy*, Application no 42559/08.

44 *JZ* EU:C:2016:610 paras 55–57.

45 A Weyembergh et al ‘European Added Value Assessment: The EU Arrest Warrant. Annex 1. Critical Assessment of the Existing European Arrest Warrant Framework Decision’, (EU, 2014) Research Paper, doi: 10.2861/44748, p 35.

46 *Stefano Melloni v Ministerio Fiscal*, Case C-399/11, EU:C:2013:107, para 63.

The executing judge must assess the proportionality of detention under Article 52 CFREU. As *Căldăraru* and *Radu* have shown, the evaluation of the executing authority in terms of the right to liberty is twofold. It can – based on *information from* and *interaction with* the issuing judge – refuse to recognise or execute the EAW, and decide on detention of the surrender pending recognition and execution.

The latter scenario is particularly important under Article 52 CFREU. The introduction of rigid time limits for recognition and surrender has undeniably improved the right to liberty, as compared to extradition. Within and outwith those limits, the executing judge has an obligation to interpret the EAW in compliance with Articles 6 and 52 CFREU. The executing judge must use those provisions, when deciding whether to hold the person in detention after s/he received an EAW. Indeed, it is that authority in charge of the ruling on deprivation of liberty in the first place. The test would *always* apply. It constitutes a preliminary requirement of any limitations of the Charter rights (then also the right to liberty) under Article 52 CFREU, and should relate the proportionality of *opting for detention to the aim of ensuring the enforcement of the EAW*. To this end, circumstances such as the seriousness of the offence, the time of its (alleged) commission, as well as the personal situation of the person concerned in the executing Member State (in terms of family, working and social links), should be taken into account.

This being a regular scenario, the question arises as to how to interpret the FD when the system experiences ‘hiccups’. *Lanigan* made it clear that the expiry of the terms laid down in the FD gives rise to no right to release for the person concerned. The possible implication of this finding is that the person would still be deprived of liberty for other states’ authorities failures. The *Vilkas* case reinforces and broadens such a concern. It is understandable that the Court objected to the application of Article 23(5) FD – obligation to release the person after the expiry of the deadlines laid down in Article 23(2) to (4) – to situations where the delay was caused by the surrender. However, the CJEU more broadly phrased its objection as based on situations beyond Member States’ control, so potentially including cases where the person bears no responsibility. The accent posed in *Vilkas* on Article 12 FD – allowing the executing judge to order the release – confirms the role for the executing state in terms of the right to liberty and proportionality, without however providing guidance to balance the discretion left by that ground for extended detention.

What should be firmly rejected is the argument put forward by the AG in *Căldăraru*, where the principle of proportionality was used to consider refusal of execution for possible violations of Article 4 CFREU. When breaches of absolute rights/prohibitions are at stake no room for proportionality can possibly be made: the balance inherent in the use of proportionality is incompatible with *absolute* prohibitions. The application of the former to the latter is misleading and unacceptable, as well as legally wrong.

4.2. The FDs on Transfer of Prisoners, Pre and Post Trial Measures Alternative to Detention

4.2.1. The Legal Framework

The three FDs on the transfer of prisoners, probation measures and pre-trial measures alternative to detention are highly relevant to the right to liberty. Deprivation of liberty is involved in two ways. Firstly, the coercive transfer implies logically a form of deprivation of liberty. Secondly, they all see the person being deprived of liberty before the decision recognised and the transfer executed. As shown below, this makes ‘hiccups’ of the system particularly relevant with regards to the ESO and probation measures FDs. After the transfer is completed, the individual will be subject to a new legal regime, which will differ from that of the issuing state, with the possibility of different rules concerning the *substantive* basis for detention and the *procedural* measures for deprivation of liberty. For example, the breach of a *pre* or *post* trial measure alternative to detention may have differing penalties in each member state. *Procedures* for the deprivation of liberty, concerning the enforcement of detention, the penitentiary regime and detention conditions, may also vary significantly. The FDs lay down no guarantees to ensure that each individual is adequately informed of the potential alteration in the content of their right to liberty.

The FD on the transfer of prisoners creates a mechanism of mutual recognition of custodial sentences and judgments involving deprivation of liberty between Member States. When the judgment is recognised by the executing Member State, the prisoner is consequently transferred. The purpose of the FD is to increase prisoners’ chances of rehabilitation. However, in the preamble it is stated that the consent of the person concerned should no longer be dominant, for the purposes of recognition and enforcement of the sentence imposed.⁴⁷ The person can be transferred even where s/he has not provided the consent, where the executing Member State is: the Member State of nationality in which the sentenced person lives; where the sentenced person will be deported, once s/he is released from the enforcement of the sentence on the basis of an expulsion or deportation consequential to the judgment; where the sentenced person has fled or otherwise returned in view of the criminal proceedings pending against him or her in the issuing State or following the conviction in that issuing State. The person concerned is provided with a generic ‘opportunity’ to express his/her opinion, which in turn must be taken into account.⁴⁸

The FD on probation measures provides for the application of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and sanctions alternative to deprivation of liberty.⁴⁹ The aim of the FD is enhancing the prospects of the sentenced person’s being reintegrated into society and improving monitoring of compliance with probation measures and

47 See note 1 above, recital 5, Article 4.

48 Ibid, Article 6.

49 For a historical analysis, see S Neveu, ‘Probation Measures and Alternative Sanctions in Europe: From the 1964 Convention to the 2008 Framework Decision’ (2013) 4 (1-2) *New Journal of European Criminal Law* 134.

alternative sanctions.⁵⁰ The FD involves the recognition of judgments and probation measures, and the consequent transfer of responsibility for the supervision of probation measures and alternative sanctions from the issuing to the executing Member State. The issuing State may forward a decision to the state where the sentenced person is lawfully and ordinarily residing, when the sentenced person has returned or wants to return to that State.⁵¹ If so requested, the executing State shall inform the issuing State of the maximum duration of deprivation of liberty foreseen in the executing State for the offence that could be imposed in case of breach of the probation measure or alternative sanction. The executing State shall immediately notify of any finding which may bring about the revocation of the alternative measure, or the imposition of a measure involving deprivation of liberty.⁵²

The ESO FD establishes a system of recognition of supervision measures alternative to detention. Studies have showed that Member States' judicial authority are rather reluctant to provide persons not living therein with bail. This is mainly due to the circumstance that those persons have not stable residence or address in that Member State. These individuals are consequently placed in pre-trial detention when national or resident would not, in a comparable situation. This creates a state of play in which there are two alternative choices at disposal of Member States' judiciary: provisional detention or unsupervised movement. In most cases, the national judges opt for deprivation of liberty. However, the persons affected by this framework have not been tried. Therefore, the right to liberty and the presumption of innocence of a great deal of EU citizens (and not only) are posed under threat throughout the EU.⁵³ To address this thorny issue, the EU has adopted a FD on the mutual recognition of decisions on supervision measures alternative to provisional detention. The ESO FD has a twofold aim: monitoring the defendants' movements; enhancing the right to liberty and the presumption of innocence of the persons concerned.⁵⁴ Should the person concerned not return to the issuing State voluntarily, he or she may be surrendered to the issuing State in accordance with the EAW FD, so that the latter provisions apply.

4.2.2. *Proportionality and Procedural Rights of the Individuals*

The FDs are relevant to proportionality under Articles 6 and 52 CFREU. One of the centrepieces of the right to liberty is that detention shall be carried out according to the cases and procedures established by the law. It is submitted that the FDs place the '*established procedures*' requirement under pressure, and they do so in a disproportionate way. Article 52 CFREU states that right restrictions shall be subject

⁵⁰ See note 1 above, recital 8.

⁵¹ Ibid, Article 5.

⁵² Ibid, Articles 13-16.

⁵³ E Cape et al (eds), *Suspects in Europe. Procedural Rights at the Investigative Stage of the Criminal Process in the European Union* (Intersentia, 2007).

⁵⁴ See note 1 above, recital 3.

to the principle of proportionality, which in turn implies relating the particular limitation to the objective pursued. In this sense, the FD on the transfer of prisoners pursues the reintegration of the person concerned. The same goes for the FD on probation measures, where rehabilitation sits next to the improvement of monitoring and public safety. The ESO FD aims to increase public security, and the right to liberty and the presumption of innocence.

Firstly, the absence of procedural guarantees should be mentioned. The FDs are completely silent as to the procedures to be followed when adopting the decision on the transfer: no individual rights are provided for in this respect. The FD on probation measures and the ESO FD are ‘triggered’ at the request of the person concerned. Also, in these cases the individual will be subject to deprivation of liberty, as s/he will be transferred to the executing Member State. However, these instruments do not ensure an adequate level of participation of the person concerned in the procedures of recognition, nor that the person is aware of differences between the two legal systems.⁵⁵ As counter-objections, it might be argued that Member States would be individually responsible for establishing the relevant procedures, and that the FD on transfer of prisoners would operate in a situation where the persons concerned are already deprived of liberty. The division of labour between EU and state law may not be justification for situations of legal vacuum or uncertainty, nor for discharging the fundamental rights obligation on the part of the Union.⁵⁶ Since the established procedure requirement applies to enforcement of detention as well, doubts can be raised about the proportionality of the lack of clear procedures – and of individual rights – in relation to the aim of the FDs.⁵⁷

Issues of proportionality emerge from the grounds for postponing the transfer. The three FDs provide that the transfer may be suspended until further notice when exceptional or unforeseen circumstances occur. The provision raises two main concerns. Firstly, the suspension knows no temporal limit, which means – especially in the case of probation measures and the ESO – prolonging detention *sine die* at the expenses of personal liberty. The rule is even more problematic when one considers the grounds underlying its application. Exceptional or unforeseen circumstances is a one-size-fits-all case for continuing detention that appears hardly compatible with a proportionate deprivation of liberty. On the one hand, the rationale of that specific rule is obscure. On the other, the problem remains even where that extended detention is ‘balanced’ against the broader objectives of the FDs. The measure has no bearing whatsoever with reintegration, let alone the right to liberty or the presumption of innocence.

55 Wendy De Bondt and Annika Suominen, 'State Responsibility When Transferring Non-consenting Prisoners to Further their Social Rehabilitation – Lessons Learnt from the Asylum Case Law' (2015) 5 EuCLR European Criminal Law Review 347.

56 For an argument supporting the idea that the EU’s engagement in an area of law implies a corresponding obligation of minimising the risk that fundamental rights violations occur, see Nina Marlene Schallmoser, 'The European Arrest Warrant and Fundamental Rights' (2014) 22 European Journal of Crime, Criminal Law and Criminal Justice 135.

57 For an assessment of the procedural rights, see Wieczorek’s contribution in this special issue.

Public security is the only plausible justification in this respect. However, when public security creates a space of wide discretion for public powers, it should be invoked explicitly and defined restrictively. The third remark concerns the standard of protection cleavage dividing the three FDs, on the one hand, and the EAW, on the other. There is indeed a sharp contrast between the two sets of measures. We have seen that the four FDs have significant impact on the right to liberty. Furthermore, mutual recognition procedures cannot be considered a form of criminal proceedings, although they are inextricably linked to the latter. Therefore, the application of procedural fundamental rights such as Article 47 CFREU to those procedures might be not exactly straightforward. The EU has adopted directives establishing common rules on the following rights in criminal proceedings: interpretation and translation; information; access to a lawyer; legal aid; safeguards for children suspected and accused in criminal proceedings.⁵⁸ As scope of application, the Directives lay down rules concerning these rights (1) *in criminal proceedings* and (2) *proceedings for the execution of a EAW*.⁵⁹ Therefore, the EU legislature acknowledges the difference between these two kinds of procedures. The Directives reduce the existing distance of standard of protection between criminal proceedings, on the one hand, and the EAW, on the other. This improvement has not involved the other three FDs, although they have significant implications in terms of the right to liberty as well. It is true that the Directives apply until the final judgment, so that the recognition of custodial and alternative penalties would fall outside their scope anyway. The same may not hold true for the ESO, which concerns the recognition of *pre-trial* measures other than detention. This nonetheless, one can see a clear cleavage between procedural rights standards in the legal universe constituted by the intra-EU transfer of persons related to judicial cooperation. The legal framework set out by the FDs challenges the *established procedures* requirement inherent in the right to liberty. Serious concerns can be voiced about the proportionality of these measures with the objectives of the instrument, be they reintegration or public safety.

5. Concluding Remarks

The automaticity in inter-state cooperation in criminal matters introduced by mutual recognition has inevitably called for balances in terms of fundamental rights protection. The right to liberty is significantly involved in this process of streamlining the traditional mechanisms of extradition. Although the Charter adopts Article 5 ECHR - as interpreted by the ECtHR - as its main reference in this regard, the arbitrariness test elaborated by the Strasbourg Court in the context of extradition

58 Council Directive (EU) No 2010/64 [2010] OJ L280/1; Council Directive (EU) No 2012/13 [2012] OJ L142/1; Council Directive (EU) No 2013/48 [2013] OJ L294/1; Council Directive (EU) No 2016/800 [2016] OJ L 132/1; Council Directive (EU) No 2016/1919 [2016] OJ L 297/1.

59 See T Spronken and others, *EU Procedural Rights in Criminal Proceedings* (Maklu, 2009); E Guild and L Marin (eds), *Still not resolved? Constitutional Issues of the European Arrest Warrant* (Wolf Legal Publishers, 2009).

procedures is not suitable for mutual recognition. The same standards cannot be logically applied to two different situations. Secondly, the ECtHR's test is rather debatable even when used for Article 5(1)(f), let alone the surrender of suspects or convicted persons within the Union.

The CJEU has improved the protection of the right to liberty in terms of proportionality. However, concerns may be voiced on a number of aspects. The Court has acknowledged the possibility to refuse the execution of an EAW exceptional circumstances based on possible fundamental rights violation. It has not limited states' authorities discretion in case of 'hiccups' of the system; to the contrary, it has given broad ground for extending detention pending the execution of an EAW. Similar consideration apply to the wording of some provisions of the FDs on transfer of prisoners, probation measures and the ESO. If a person is waiting to be transferred to another state to be released under a pre-trial measure alternative to detention, the suspension of recognition and execution of that order on a *one-size-fits-all* clause *until further notice* is very debatable, from a proportionality perspective. The same may hold true for the removal of the prisoner's consent to the transfer, as well as the system of adaption of the sentence raises some concerns. Over recent years, proportionality has been relied in judicial cooperation more extensively, both in legislation and the case-law. The flagship of the new era is the Directive on the European Investigation Order, which states that the issuing authority may only issue an EIO where the issuing of the EIO is necessary and proportionate for the purpose of the proceedings taking into account the rights of the suspected or accused person.⁶⁰ The EIO Directive is certainly a landmark of individual protection in EU judicial cooperation. Other than being concerned with mutual recognition of evidence rather than transfer of persons, however, it represents only one piece of a broader mosaic where proportionate deprivation of liberty is still a challenge for a number of measures.

⁶⁰ Directive 2014/41/EU [2014] OJ L 130/1, Article 6(1)(a).